



ENERGY RESOURCES TECHNOLOGY GOM, INC.

185 IBLA 180

Decided January 26, 2015



United States Department of the Interior
Office of Hearings and Appeals

Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

ENERGY RESOURCES TECHNOLOGY GOM, INC.

IBLA-2013-84

Decided January 26, 2015

Appeal from an Order to Pay of the Director, Office of Natural Resources Revenue, for unpaid rental obligations on 11 Outer Continental Shelf oil and gas leases. OCS-G 26637, *et al.* . . .

Affirmed.

1. Oil and Gas Leases: Rentals--Outer Continental Shelf Lands
Act: Oil and Gas Leases--Outer Continental Shelf Lands
Act: Oil and Gas Leases: Rentals

The Outer Continental Shelf Lands Act (OCSLA), at 43 U.S.C. § 1334(c) (2006), does not provide that leases shall terminate by operation of law for failure to drill an exploratory well in the first 5 years of the lease term or failure to timely pay rental. The Department must affirmatively act to cancel a lease for failure to comply with lease provisions, including the obligation to pay rent. As nothing in the OCSLA or regulations otherwise relieves lessees of their obligation to pay rental for each lease year that commences prior to a discovery of oil and gas in paying quantities, the leases remained in their primary term, and lease rentals continued to accrue until appellant relinquished the leases.

APPEARANCES: Paul J. Goodwine, Esq., and Nadege Assalé, Esq., New Orleans, Louisiana, for appellant; Matthew *Ballenger*, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Natural Resources Revenue.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Energy Resources Technology GOM, Inc. (Energy Resources), appeals from a November 28, 2012, Order to Pay issued by the Director, Office of Natural Resources

Revenue (ONRR), in the amount of \$918,720 for unpaid rental obligations on 11 Outer Continental Shelf (OCS) oil and gas leases.

Background

The 11 leases at issue were acquired by Energy Resources' predecessors-in-interest through several separate lease sales conducted between August 2004 and August 2005.¹ As these leases were issued for drilling in water depths of 400 to 800 meters, Departmental regulations provided that the primary term of each lease would be 8 years. *See* 30 C.F.R. § 256.37(a)(2) (2005) (now codified as 30 C.F.R. § 556.37(a)(2)). Those regulations also stipulated that, "[f]or leases issued with an initial term of 8 years, you must begin an exploratory well within the first 5 years of the term to avoid lease cancellation." 30 C.F.R. § 256.37(a)(3) (2005).

All appeared to be in order until ONRR's predecessor, the Minerals Management Service (MMS), inadvertently delayed issuing courtesy notices for rentals owed after the fifth lease year for 2009, 2010, and 2011.² Whether Energy Resources reported to the Department that it relied on receiving such courtesy notices is not established in the record. *See* Administrative Record (AR) 240 (Aug. 15, 2011, email from Alicia Caldwell, Energy Resources, to Kathy Tyler, ONRR). Nevertheless, Energy Resources failed to submit the proper rental for those lease years. On August 18, 2011, ONRR issued two demand letters for unpaid rentals for the subject leases.³ The first 10 leases were at or nearing the completion of the seventh lease year, while OCS-G 27628

¹ ONRR identified the leases as OCS-G 26637, OCS-G 26638, OCS-G 26642, OCS-G 26643, OCS-G 27257, OCS-G 27258, OCS-G 27325, OCS-G 27326, OCS-G 27342, OCS-G 27345, and OCS-G 27628.

² Energy Resources contacted ONRR in July 2011 about the failure to pay rental for the subject leases.

³ The first demand for payment was in the amount of \$864,000 for accrued rentals for the first 10 leases. The second demand letter was in the amount of \$54,720 for the 2010 lease year rental for OCS-G 27628.

Appellant notes that the first demand for payment was addressed to Energy Resource Technology, Inc., a company that technically did not exist. At one point the leases were held by Energy Resource Technology, Inc. After a merger in 2007, the resulting entity was renamed Energy Resources Technology GOM, Inc., and the proper paperwork was filed. *See* Statement of Reasons (SOR) at unpaginated (unp.) 2 n.2. While Energy Resources has identified this error to the Board, it does not contend it constitutes a fatal flaw in this proceeding. Moreover, the demand letter reviewed here is not the letter issued in August 2011.

was nearing the end of its sixth lease year. In September 2011, ONRR rescinded the individual invoices on which the demand letters had been predicated in order to consider whether requiring rental payment was the correct action. *See* AR 164-76, 191-235.

Meanwhile, on September 30, 2011, Energy Resources relinquished 5 of the subject leases and on April 27, 2012, it relinquished the remaining 6 leases. By letter dated October 12, 2011, Energy Resources responded to the August demand for payment, arguing that each lease automatically terminated by its own terms on the sixth anniversary when no exploratory wells had been completed and no rent had been tendered. AR 367-70. The Department considered the matter, and on September 13, 2012, the Director of the Bureau of Ocean Energy Management (BOEM), another of the successor agencies to MMS, concluded that an 8-year lease does not terminate automatically by operation of law if it is not drilled within the first 5 years, but remains in its primary term, accruing rental obligations, until cancelled by the Department or relinquished by the lessee. AR 443-45.

On November 28, 2012, ONRR issued invoices for the outstanding rental obligations that had accrued for 2009, 2010, and 2011, before the lease relinquishments were submitted. On that same day, the Director, ONRR, issued the Order to Pay, which accompanied the invoices.

The Parties' Arguments

In its SOR, Energy Resources cites two principal reasons for appealing the Orders. First, Appellant contends ONRR is estopped from making the November 2012 demand because it agreed to and did “credit”⁴ the invoices in dispute when the matter was presented and reviewed in August 2011, which therefore closed the issue of whether accrued rent was due. Second, Energy Resources argues that the demand for payment is contrary to applicable law and regulations. It asserts the leases automatically expired after the first 5 years of the primary term when no exploratory drilling had been commenced. Energy Resources further contends the leases automatically terminated when the rental for the sixth year was not received on or before the anniversary due date immediately following the fifth lease year. Under either scenario, it argues, the leases could not be revived to accrue the rental payments ONRR now demands.

ONRR responds the leases did not automatically expire or terminate by operation of law, asserting that the statutory language of the Outer Continental Shelf Lands Act of 1953 (OCSLA), 43 U.S.C. §§ 1331-1356 (2006), regarding cancellation negates the notion that such expiration or termination automatically occurs when the

4 ONRR explains that to “credit” a bill or invoice is to cancel or void it. Answer at 22.

lessee fails to drill the lease within the first 5 years or pay annual rental by the lease anniversary date. ONRR argues that estoppel is inapplicable in this case because Energy Resources has not demonstrated it relied on an affirmative statement made by the Department determining the subject lease rental obligations for 2009 through 2011 had been resolved.

Analysis

The OCSLA, 43 U.S.C. §§ 1331-1356 (2006), authorizes the Department to issue and manage leases on the OCS for oil and gas exploration, development, and production. All of the subject leases were issued “for an initial period of eight years.” AR 254, 271, 286, 301, 316, 329, 342, 398, 413, 428. Section 1 of the lease provides the lease is subject to the OCSLA, other applicable statutes, and all implementing regulations in effect when the lease was issued. Section 2 of the lease provided that “[p]ursuant to 30 CFR 256.37, commencement of an exploratory well is required within the first 5 years of the initial 8-year term *to avoid lease cancellation.*” *Id.* (emphasis added).

The regulation at 30 C.F.R. § 256.37(a)(3) (2005 through 2011) stipulated that “[f]or leases issued with an initial term of 8 years, you must begin an exploratory well within the first 5 years of the term *to avoid lease cancellation.*” (Emphasis added.) In October 2001, before the leases were issued, MMS released the Outer Continental Shelf Oil and Gas Leasing Procedures Guidelines, OCS Report MMS 2001-076. AR 1. The Department there explained its policy regarding 8-year OCS leases:

During the primary term, lessees do not have deadlines for conducting exploratory or development activities, **except leases issued with a primary term of 8 years.** The 8-year leases require commencement of an exploratory well within the first 5 years *to avoid cancellation* of the lease (30 CFR 256.37(a)(3)). The lease term does not expire if you do not begin drilling a well.

If you decide not to drill an 8-year lease within the first 5 years, you have forfeited the right to drill in the remaining three years of the lease. However, the **lease continues in primary term** and you are responsible for payment of the 6th, 7th, and 8th year rental fees. *To avoid these additional rental fees, the lease must be relinquished prior to the expiration of the 5th year, or future lease anniversary dates.*

AR 58 (italicized emphasis added).

[1] Unlike the rules it established for onshore leasing, *see* 30 U.S.C. § 188 (2006) (automatic termination for failure to timely pay rent), Congress clearly did not provide in the OCSLA that an OCS lease shall terminate by operation of law for failure to drill an exploratory well in the first 5 years of the lease term or failure to timely pay rental. Instead, the Department must affirmatively act to cancel a lease for failure to comply with lease provisions, including the obligation to pay rent:

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter, such lease *may be canceled by the Secretary, subject to the right of judicial review* as provided in this subchapter, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

43 U.S.C. § 1334(c) (2006) (emphasis added); *see* 30 C.F.R. § 556.77(a). To cancel a lease, the Department must take specific, affirmative action, including judicial proceedings when the lease is producing. 30 C.F.R. § 556.77. In contrast, where Congress provides that a lease shall terminate automatically upon the occurrence of a prescribed event or circumstance, no action on the Secretary's part is required; termination occurs by operation of law upon the lessee's failure to timely act to comply with Congress' requirements. *See Oil Resources, Inc.*, 28 IBLA 394, 405, 84 I.D. 91, 97 (1977).

The Leases therefore did not automatically terminate when the obligatory exploratory wells were not drilled in the first 5 years of the lease term, and did not automatically terminate when the rental payments were not tendered on or before the lease anniversary dates. As nothing in the OCSLA or regulations otherwise relieves lessees of their obligation to pay for "each lease year which commences prior to a discovery in paying quantities of oil and gas on the leased area, a rental as shown on the [lease]," the leases remained in their primary term, and lease rentals continued to accrue until Energy Resources relinquished the leases. *See, e.g.*, AR 272 (Sec. 4 of the Lease form).

What remains is Energy Resources' estoppel argument. Estoppel against the United States is an extraordinary remedy that must be based upon some form of affirmative misconduct or misstatement by the agency, including misrepresentation or concealment of material facts in an official written decision. *See, e.g., Jack C. Scales*, 182 IBLA 174, 180 (2012). Energy Resources argues ONRR misled it by rescinding the invoices and "crediting" the accounts. ONRR properly argues the "crediting" of a bill or invoice "does not suggest a satisfaction or forgiveness of the monetary obligation reflected in the bill." Answer at 22 (citing Declaration (Decl.) of Kathy Tyler, an ONRR Minerals Revenue Specialist who was personally involved with the issuance of

the invoices, ¶15 at 4). Tyler further attests she had no authority to forgive or release a monetary obligation owed to the United States. Tyler Decl., ¶15 at 4. We think it plain there was no official “misstatement” or “misconduct,” and no official written decision was issued that either determined no rental was owed or that Energy Resources was no longer liable for accrued rentals. The “crediting” action served only to hold the demand for payment in abeyance pending further consideration by ONRR, and could not alone relieve Energy Resources of the rental obligation imposed by its Leases. Energy Resource’s estoppel claim is without merit.

As the Department took no steps to cancel them, the leases did not terminate until Energy Resources relinquished them in September 2011 and April 2012. The plain language of the relevant statutes, regulations, and lease terms therefore obligated Energy Resources to tender the annual rental payments accruing for those lease years prior to relinquishment. The failure to do so created a debt obligation for which it is properly held liable.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from is affirmed.

_____/s/
T. Britt Price
Administrative Judge

I concur:

_____/s/
James F. Roberts
Administrative Judge